

STATE OF MICHIGAN
COURT OF APPEALS

TYRONE POPE,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Not Participating,

and

RONY ALBERTO ANDINO-GUERRERO,

Defendant-Appellee.

UNPUBLISHED

April 9, 2002

No. 227893

Washtenaw Circuit Court

LC No. 98-010171-CK

Before: K. F. Kelly, P.J., and Doctoroff and Cavanagh, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order denying attorney fees as a sanction for filing a frivolous defense. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed this action alleging negligence and gross negligence after his car was struck by a vehicle driven by defendant. The defense was assigned to defendant's insurer, who filed an answer denying negligence. Defendant left the country, and counsel was not able to contact him. Defense counsel subsequently offered to stipulate to an admission of negligence.

After the jury returned a verdict of \$5,000 in favor of plaintiff, plaintiff moved for attorney fees based on the assertion of a frivolous defense. The trial court taxed costs and denied attorney fees.

MCL 600.2951(1) requires the imposition of sanctions if a court finds that a defense was frivolous. A defense is frivolous if one of the following conditions is met:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

This Court will not disturb a trial court's finding that a defense was not frivolous unless the finding is clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997).

Where defense counsel could not contact his client before an answer was filed, he acted reasonably in leaving plaintiff to his proofs. The filing of a defense is not frivolous merely because the facts have not been fully substantiated. *Louya v William Beaumont Hosp*, 190 Mich App 151, 162; 475 NW2d 434 (1991). The statute and the rules of professional conduct should be read together to avoid the anomalous result of holding an attorney personally liable for attorney fees after ethically representing his client's interests. *Id.*, 163.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh